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In the Supreme Court of the United States

October Term 1962

No. 597

JOHN WIGHT AND MONDAKOTA GAS COMPANY, A CORPORATION

Petitioners

vs.

MONTANA-DAKOTA UTILITIES CO., A CORPORATION

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF MONTANA-DAKOTA UTILITIES CO. IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit affirming the judgment of the District Court is reported in 299 F. 2d 470.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on the 17th day of January 1962, and a petition for rehearing was denied on the 21st day of June 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The question presented on this petition is whether the decision of the court below is in conflict with the decison of this Court in *Parissi* v. *Telechron, Inc.*, 349 U.S. 46.

STATEMENT

An examination of the brief in support of the petition for writ of certiorari conclusively demonstrates the absence of any grounds for the issurance of the writ. There is neither any good reason nor any public interest which would require review by this Court of the decision of the court below. That this is so can best be demonstrated by a brief summary of the litigation which preceded the filing of the petition.

1. *Mondakota* case: On or about September 21, 1949, Mondakota Gas Company commenced an action against Montana-Dakota Utilities Co. in the United States District Court for the District of Montana, alleging that Montana-Dakota Utilities Co. refused to transport natural gas through its pipelines for Mondakota Gas Company, and claiming $30,612,480.00 in damages. On November 1, 1951, the district court granted defendant's motion for summary judgment. *Mondakota Gas Co.* v. *Montana-Dakota Utilities Co.*, 103 F. Supp. 666 (D. Mont.). Mondakota Gas Company appealed to the Court of Appeals for the Ninth Circuit, and on February 25, 1952, its appeal was dismissed. *Mondakota Gas Co.* v. *Montana-Dakota Utilities Co.*, 194 F. 2d 705 (9th Cir.), *reh. den.*, April 2, 1952, *ibid.* The ground upon which the Court of Appeals based its decision was that Mondakota Gas Company failed to make payment of the required filing fee within the time allowed by statute and consequently

failed to perfect its appeal. Certiorari was denied by this Court on October 13, 1952. *Mondakota Gas Company, Petitioner, v. Montana-Dakota Utilities Co.*, 344 U.S. 827. Rehearing was denied on June 6, 1955, 349 U.S. 969.

2. *McClellan* case: On or about October 25, 1950, John Wight and Joseph L. McClellan, Trustee in Bankruptcy for Capital Gas Corporation, commenced an action in the United States District Court for the District of Minnesota, seeking to recover $39,000,000.00 in damages. The legal theory upon which this action was based was the same as that pursued in the *Mondakota* case. On March 5, 1952, the district court granted defendant's motion for summary judgment. *McClellan* v. *Montana-Dakota Utilities Co.*, 104 F. Supp. 46 (D. Minn.). On May 8, 1953, the Court of Appeals for the Eighth Circuit affirmed. *McClellan* v. *Montana-Dakota Utilities Co.*, 204 F. 2d 166 (8th Cir.). Certiorari was denied on October 12, 1953, 346 U.S. 825.

3. *Instant* case: The instant case was commenced on August 26, 1953, in the United States District Court for the District of Montana, by Montana-Dakota Utilities Co., the defendant in both the *Mondakota* and *McClellan* cases. Mondakota Gas Company and John Wight, defendants herein, thereupon filed counterclaims, which *reasserted* the identical claims asserted by Mondakota Gas Company in the *Mondakota* case. John Wight, who is a stockholder and officer of Mondakota Gas Company and who was a stockholder and officer of Capital Gas Corporation, asserted on his own behalf and for his own benefit, identically the same claims asserted by the plaintiffs in each of the

Mondakota and *McClellan* cases. The district court granted plaintiff's motion for dismissal of and summary judgment on the defendant's counterclaims (unreported decision). John Wight and Mondakota Gas Company appealed to the Court of Appeals for the Ninth Circuit which affirmed, 299 F.2d 470, (9th Cir.). On November 16, 1962, John Wight and Mondakota Gas Company petitioned this Court for a writ of certiorari.

4. *Parissi* case. This case is in no way directly involved in either the present litigation nor in the *Mondakota* or *McClellan* cases. On April 11, 1955, in *Parissi* v. *Telechron, Inc.*, 349 U.S. 46, this Court expressed disapproval of the Court of Appeals decision in the *Mondakota* case. On the basis of the *Parissi* decision, Mondakota Gas Company applied to this Court a second time for rehearing of its petition for certiorari, which petition originally had been denied on October 13, 1952, 346 U.S. 827. This Court denied rehearing on June 6, 1955. *Mondakota Gas Company, Petitioner,* v. *Montana-Dakota Utilities Co.*, 349 U.S. 969.

ARGUMENT

Applicable Law

The law on the question presented by petitioner was settled by this Court in *U.S. v. Munsingwear*, 340 U. S. 36, *affirming*, 178 F. 2d 204 (8th Cir.). In its opinion, the Court of Appeals for the Eighth Circuit stated precisely the rule of law which governs the instant case:

> While the appeal is pending, the judgment is not final, but is presumptively correct. When the appeal is dismissed, the judgment as we understand the law,

becomes final and conclusive as between the parties with respect to all issues actualy tried and determined. (*U.S.* v. *Munsingwear*, 178 F. 2d 204, 209 (8th Cir.)

The opinion of the court below sets forth in detail the authorities on this question. It would be repetitious and burdensome to brief the question further. We are in complete accord with the determination of the court below and the reasons and authorities relied upon in support thereof.

Petitioners' Contention

Without citing or referring to any supporting authority, petitioners contend that the decision of the district court in the *Mondakota* case is not *res judicata* with respect to the issues presented and disposed of in that case because the appeal was dismissed on technical grounds rather than having been determined on the merits. Petitioners rely, albeit mistakenly, on the decision in the *Parissi* case which disapproved the decision of the Court of Appeals for the Ninth Circuit in the *Mondakota* case.

Petitioners contend that the decision of the court below in the instant case is not in accord with the decision of this Court in the *Parissi* case. We do not understand this argument. The court below fully considered the matters before it and affirmed the decision of the district court on the authority of the *Munsingwear* decision, holding that the *Mondakota* case was *res judicata* with respect to all matters presented therein even though the appeal from the district court's determination was dismissed on technical grounds notwithstanding that such grounds were disapproved of by this Court some three years later in the *Parissi* case. The *Parissi* decision is in no way involved in the instant case.

If petitioners are correct in their view of the law, immediately after this Court's decision in the *Parissi* case, petitioners could have commenced a new action asserting the same claims pleaded in the *Mondakota* case, despite the entry therein of summary judgment for defendant, the dismissal of Mondakota Gas Company's appeal and the denial of certiorari. Furthermore, if petitioners' contention were correct, no case the appeal of which was dismissed on so-called "technical" grounds would ever be final because the possibility would always exist that this Court might, at some later date, disapprove of the grounds upon which the dismissal of the appeal in the earlier case was based. Obviously this is not the law.

So far as the petition of John Wight is concerned, it is easy to understand why it is that, even though he asserts counterclaims in an amount approaching one hundred million dollars and has been represented by many counsel in these various proceedings, he now finds himself as his own counsel. As the lower court pointed out (Appendix A 16, 17), he cannot as a stockholder assert for himself the claims of the corporations and recover personally the damages which the courts have denied to them. It is clear that he suffered no damages individually and that the claims he asserts are barred by the statute of limitations. (Appendix A, 18).

CONCLUSION

The decision of the court below is not, as petitioners erroneously contend, in conflict with the decision of this Court in *Parissi* v. *Telechron, Inc.*, 349 U.S. 46. Therefore, there are no grounds for this Court to issue the writ of certiorari, and we respectfully submit that the petition should be denied.

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